

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1268

To be argued by
PETER NOEL DUHAMEL

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1268

UNITED STATES OF AMERICA,

Appellee,

—v.—

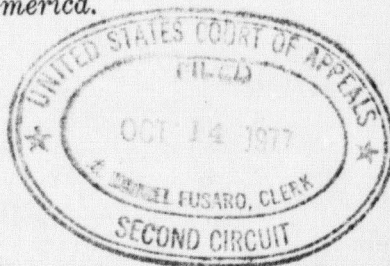
ALLAN SONNENSCHN, *Defendant-Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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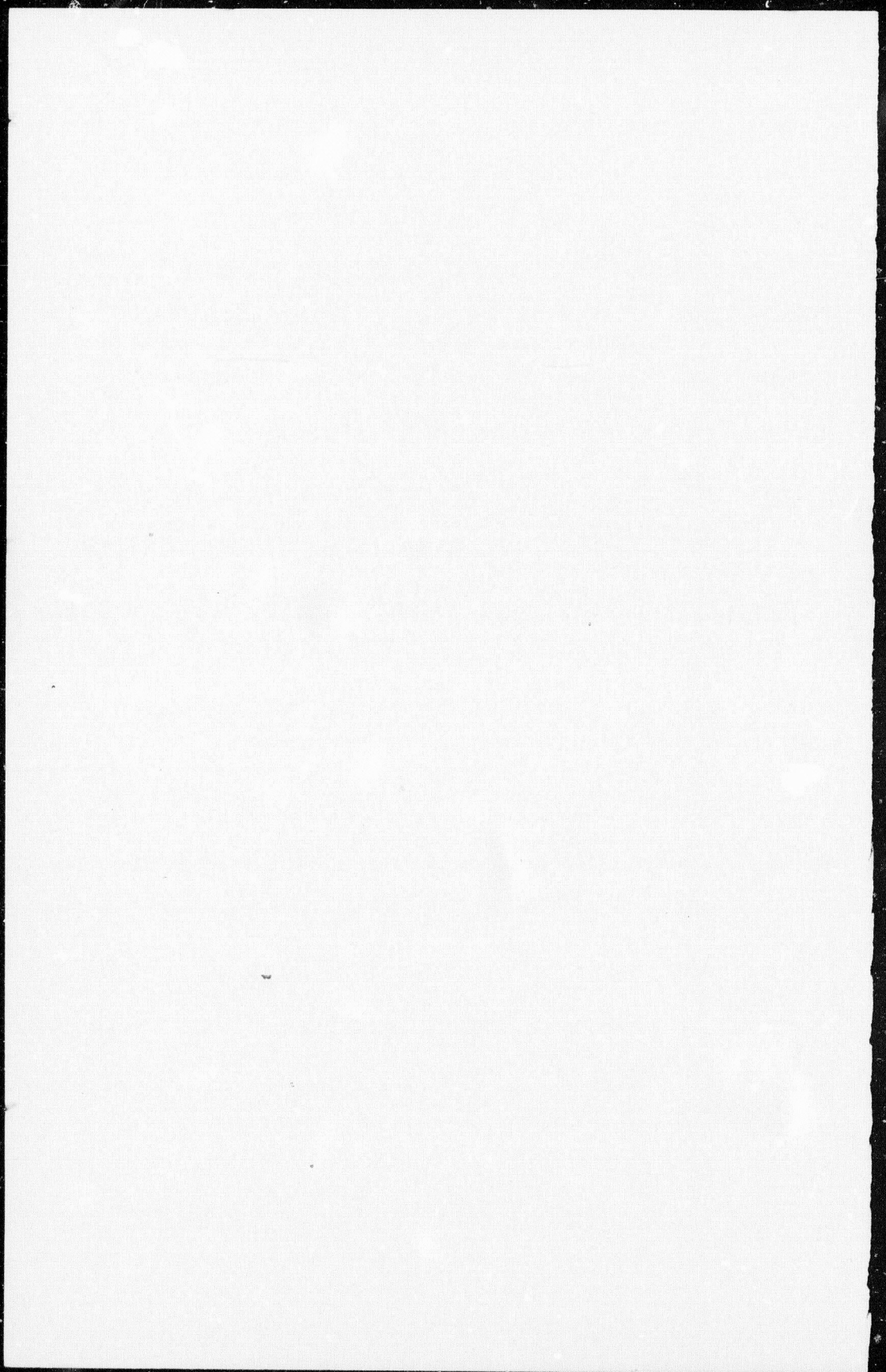


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Appellee,

—v.—

ALLAN SONNENSCHIN,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Allan Sonnenschein appeals from a judgment of conviction entered on May 24, 1977, in the United States District Court for the Southern District of New York, after a trial before the Honorable Gerard L. Goettel, United States District Judge, and a jury.

Indictment S 76 Cr. 1141 was filed in two counts on March 31, 1977.* Count One charged Sonnenschein and Leslie Triffleman** with conspiracy to distribute, and to

* This indictment superseded Indictment 76 Cr. 1141, filed on December 22, 1976, on which Sonnenschein was first tried. Trial on the original indictment resulted in a mistrial when the jury was unable to reach a verdict.

** Triffleman pleaded guilty to Count Two, the substantive count, and testified on behalf of the Government at the trial of Sonnenschein.

possess with the intent to distribute, a Schedule II controlled substance, to wit, methaqualone, in violation of Title 21, United States Code, Section 846. Count Two charged Sonnenschein and Triffleman with the actual possession and distribution of a quantity of methaqualone, in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(B), and Title 18, United States Code, Section 2.

Trial on the original indictment commenced before Judge Goettel on March 7, 1977, and ended in a mistrial on March 10, 1977, when the jury was unable to reach a verdict.

The second trial commenced on April 6, 1977, and continued until April 12, 1977, when the jury returned a verdict of guilty as to Count One, the conspiracy charge.*

On May 24, 1977, Sonnenschein was sentenced by Judge Goettel under Title 18, United States Code, Section 3651, to a period of imprisonment of three years, on condition that the defendant be confined in a jail-type or treatment institution for a period of three months, the execution of the remainder of the sentence to be thereupon suspended, to be followed by a special parole term of three years.

Sonnenschein is presently at liberty on bail pending this appeal.

* The jury was unable to reach a verdict as to Count Two. Count Two subsequently was dismissed on May 24, 1977, with the Government's consent.

Statement of Facts

The Government's Case

A. Synopsis

The evidence at trial established that in late 1976 Allan Sonnenschein and Leslie Triffleman were partners in a plan to obtain unlawfully quantities of methaqualone pills from a variety of sources and thereafter to sell these pills on the street at a handsome profit. In the course of the conspiracy Sonnenschein and Triffleman on one occasion sold 300 methaqualone tablets, on December 3, 1976, to an undercover agent of the Drug Enforcement Administration ("DEA").

The Government's case was proved at trial through the testimony of Triffleman (Sonnenschein's co-defendant), John DiGravio, a Special Agent of DEA, surveillance agents who were present when the December 3, 1976 sale occurred, several pharmacists from whom methaqualone had been obtained by the defendants, a handwriting expert, and assorted documentary evidence.

B. The Conspiracy Begins

During the first week of November 1976, Sonnenschein and Triffleman launched their plan to distribute quantities of methaqualone. (Tr. 38). * At the outset it was

* References to the second trial transcript are cited as "Tr."; "GX" refers to Government Exhibits introduced at trial; "Tr.-I" refers to the transcript of the first trial; "H." refers to the transcript of the preliminary proceedings that took place on April 4, 1977, two days prior to the commencement of the second trial; "S." refers to the transcript of the sentencing proceeding that took place on May 24, 1977. References to Defendant's brief on this appeal are cited as "Br."

agreed that the two would go to one, Doctor Gilbert Miller, and obtain from him prescriptions for methaqualone, and would thereafter go to drug stores to fill the prescriptions. Finally, Sonnenschein and Triffleman agreed that once supplied with a quantity of pills they would sell the methaqualone in the street market. (Tr. 40).

In November and December, 1976, Sonnenschein and Triffleman put their plan into operation. On several occasions the two obtained prescriptions from Dr. Miller, for which they paid \$10.00 for each prescription. Normally each prescription allowed for the purchase of approximately 50 tablets of methaqualone. Sonnenschein and Triffleman then filled the prescriptions at different pharmacies where they paid anywhere from \$8.00 to \$20.00 for approximately 50 tablets. The defendants in turn sold these tablets to customers on the street at \$3.00 per tablet (Tr. 41), thereby netting a substantial profit.*

In late November 1976, during the course of the conspiracy, Sonnenschein proposed a plan by which he and Triffleman would order the methaqualone capsules directly from the drug companies that manufactured them, thus cutting out the added expense of payment for the prescriptions and enabling the defendants to obtain larger quantities of the drug more conveniently. (Tr. 41-43). At the same time, the defendants in fact

* Triffleman identified the names utilized by her and Sonnenschein on the illegally obtained prescriptions as: her own and Sonnenschein's names; "Marty Sachs"; "Germaine Sonnenschein"; "Adam Samuelson"; "Vivian Krasner"; "Susan Scheinberg"; "Stephen Scheinberg"; and others. (Tr. 62-65). Triffleman also identified some of the various pharmacies from which they obtained the tablets. (Tr. 65).

contacted a pharmaceutical company in furtherance of that plan.* (Tr. 46-48).

C. The December 3, 1976 Sale to Agent DiGravio

In the early part of the week ending Friday, December 3, 1976, a sale of methaqualone was arranged over the telephone by Triffleman with a woman known to her at that time only as "Carol". Carol and Triffleman agreed that they would meet at a coffee shop at the corner of 79th Street and Second Avenue at 3:30 in the afternoon of December 3rd.

Triffleman then told Sonnenschein about the proposed sale of 300 methaqualone tablets, and together they obtained prescriptions from Dr. Miller to cover the order. Sonnenschein and Triffleman then went to various drug stores to fill the prescriptions.

On December 3rd, Sonnenschein, after obtaining the tablets from three different drug stores, met with Triffleman at 3:00 o'clock at the previously designated coffee house. (Tr. 55-56). When Triffleman arrived, Sonnenschein moved to a booth with her at which time Sonnenschein said "here are the pills", and gave them to

* From Triffleman's apartment the defendants called Rorer, the pharmaceutical company that manufactures methaqualone. (Tr. 46). They were advised at that time that the sales representative of the company would have to personally contact Dr. Miller. The salesman was identified as Gus Arzaga. (Tr. 47). Subsequently, Dr. Miller met with Mr. Arzaga and received his business card from him, which the doctor in turn gave to Sonnenschein, and which Sonnenschein gave to Triffleman. (GX 2; Tr. 48). At that time they also obtained information regarding the procedures to be followed for doctors to order methaqualone directly from the drug companies, including the official licensing number of Dr. Miller and the telephone number of the Federal Government DEA compliance investigator. (GX 1; Tr. 42, 104).

Triffleman. At approximately 3:30 P. M., Carol arrived with Special Agent DiGravio who, acting in an undercover capacity, was introduced to the defendants as "John". Sonnenschein, Triffleman, DiGravio and Carol then seated themselves at a booth where they proceeded to consummate their deal. (Tr. 57).

After some preliminary conversation, * DiGravio gave \$900 to Sonnenschein for the purchase of 300 methaqualone tablets. Sonnenschein placed the money in his pocket. (Tr. 59). At approximately that same time Triffleman transferred the pills to DiGravio. (Tr. 60). Soon thereafter "John" and "Carol" left the coffee shop. (Tr. 59).

Special Agent John DiGravio of the Drug Enforcement Administration testified that he and Carol Clifford were the two people who purchased the methaqualone from Sonnenschein and Triffleman on December 3, 1976. (Tr. 338-39).** In describing the December 3rd meeting, DiGravio confirmed that Sonnenschein asked him for the money, at which point he gave him \$900 dollars. At approximately the same time Triffleman passed a paper bag containing the methaqualone tablets to DiGravio. (Tr. 346). Sonnenschein then asked DiGravio

* Triffleman overheard parts of an ongoing conversation between Sonnenschein and "John", in which future drug sales were discussed. (Tr. 58).

* Agent DiGravio explained that Carol Clifford, a paid informant, had made contact with "Leslie", a person known to her as someone who sold methaqualone. On approximately November 30, 1976, DiGravio instructed Clifford to arrange for a sample purchase of 300 tablets of methaqualone from "Leslie". This meeting was arranged for the Burg-A-Cue Coffee House on 79th Street and Second Avenue for the afternoon of December 3, 1976, at approximately 3:30 P.M. (Tr. 340). At that time DiGravio and Clifford did in fact meet with Sonnenschein and Triffleman at the arranged location. (Tr. 432-43).

how many tablets he would be capable of purchasing per week, to which DiGravio responded "four or five thousand." Triffleman stated that the price would nevertheless remain at \$3.00 per tablet. (Tr. 349). Finally, after some further conversation relating to other future drug transactions, the meeting ended when Sonnenschein advised DiGravio that he could contact Triffleman for further dealings with them. (Tr. 352).*

DEA Group Supervisor, Francis White, and Special Agent George Whelan testified to their surveillance activities on December 3, 1976, during the sale to DiGravio. Both White and Whelan, whose primary function was to protect the undercover agent, DiGravio (Tr. 213),** remained in the crowded coffee shop for only 10 minutes. Neither had a clear view of DiGravio and Sonnenschein and neither agent saw any objects pass between the undercover agent and the defendant. (Tr. 217-18, 220, 247-48).***

Representatives from four pharmacies testified regarding the identification of certain prescriptions which had been presented to their respective businesses. Albert Hochman, the owner of Mirror Pharmacy located at 1104 Lexington Avenue, Manhattan, identified the defendant as "Marty Sachs." (Tr. 310). Mr. Hochman also identified a prescription for methaqualone in the name of

* In fact, DiGravio did contact Triffleman again to discuss other sales, as was corroborated by tape recordings of subsequent conversations between DiGravio and Triffleman which were received in evidence. (Tr. 252-58; GX 5, 6, 7).

** White testified that their secondary function was identification of the suspects to assist in surveillance on future transactions, and thirdly to observe any transactions, if possible. (Tr. 214).

*** White testified that he spent no more than 20 to 30 seconds at a time actually looking at DiGravio and the others. (Tr. 220). Whelan also limited his direct observations of the group under surveillance to periodic intervals lasting only a few seconds. (Tr. 250).

"Marty Sachs", as being one which was left by the defendant at his pharmacy. (Tr. 310-12; GX 11A). Leon Liebshardt, the owner and operator of Plaza Pharmacy located at 1091 Second Avenue, Manhattan, identified the defendant as an individual who used the name "Steinberg" or "Sheinberg" in his pharmacy, and who obtained from his pharmacy a prescription for methaqualone. (Tr. 332-33). Liebshardt also testified that he believed the defendant at one time picked up a prescription in the name of his wife. (Tr. 334).

The Defense Case

Sonnenschein did not testify at this trial,* but called two character witnesses, as well as an assistant college professor, Fernando Luis Alvarez. Alvarez testified that Sonnenschein broke an engagement with him for the afternoon of December 3, 1976, explaining that he had to do a favor for Triffleman. (Tr. 417). Alvarez also testified that in his presence Triffleman apologized to Sonnenschein after the December 3rd incident for getting Sonnenschein into this situation. (Tr. 420).

* Sonnenschein did testify in his own behalf at the first trial. (Tr.—I 158-236). Sonnenschein testified that at the time of the December 3rd incident he had no knowledge that a drug transaction was taking place. (Tr.—I 162). Sonnenschein also testified that he had never been the source of any drugs. (Tr.—I 203).

ARGUMENT

POINT I

Defendant Was Not Denied Effective Assistance Of Counsel.

Sonnenschein argues that his Fifth and Sixth Amendment rights to effective assistance of counsel were violated by the circumstances of his representation by retained counsel in this case. Specifically, Sonnenschein suggests to this Court that his privately retained attorney, Stephen Laifer, unexpectedly left for a vacation in Bermuda mid-trial and that substituted counsel, David Jacobs, an associate in Laifer's firm, was totally unprepared to represent the defendant at this trial. These contentions, based upon a recklessly incomplete and highly misleading statement of the events that transpired in the District Court, are simply wrong. As we will now demonstrate, a careful and thorough review of the record makes clear that the substitution of trial counsel in this case was accomplished with the defendant's prior full awareness and approval, and that defendant received adequate and effective representation at all stages of the trial.

A. A Chronology of the Developments in the Trial Court

At the conclusion of Sonnenschein's first trial on March 10, 1977, the District Court expressly advised Sonnenschein and his counsel, Mr. Laifer, that the retrial would commence on April 4, 1977. The trial judge also advised defendant and his counsel that this was a "firm" date, unless the court was advised by Sonnenschein's counsel within a few days of any previous commitments that created a conflict. (Tr.—I 482). The Dis-

trict Court was not notified of any conflict and therefore the date was held as a "firm" trial date. (Tr. 175).

On Friday, April 1, 1977, the trial judge was advised indirectly that Mr. Jacobs would represent Sonnenschein during the retrial.* This notification was the first indication to the District Court that Mr. Laifer would not retry the case. (Tr. 176). In response to this sudden and unexpected communication, Judge Goettel directed Laifer and Jacobs to appear before the court on April 4, 1977. At this conference, which the defendant did not attend, Laifer for the first time confirmed to Judge Goettel that Mr. Jacobs would handle the retrial and that he was not available to begin trial on that day. (H. 3-4). Laifer also stated that he did not want to try the case since he had confirmed arrangements to start a vacation in Bermuda on Thursday, April 7, 1977.

Both Laifer and Jacobs advised the trial judge that Jacobs had consulted with Sonnenschein on several occasions in preparation for trial. (H. 12-13). On the basis of these representations the trial judge reluctantly agreed to adjourn the retrial until April 6, 1977, but warned that if at that time neither Jacobs nor Laifer was available for trial the law firm with which both were associated would be fined \$500 per day for contempt. (H. 13).

On April 6, 1977, Laifer appeared before Judge Goettel, who was advised that Jacobs was still unavailable to begin the retrial,** but would very shortly be relieved of

* A state court judge called Judge Goettel and advised him that Jacobs might be delayed because he was then on trial in New York Supreme Court. (Tr. 176).

** As indicated in the footnote above, Jacobs was then concluding a jury trial in state court. On April 6, 1977, Judge Goettel stated that he had been advised that the state trial had reached the stage of instructions to the jury and deliberations were expected to commence within a few hours. (Tr. 5).

his conflicting engagement in the state court and would come over to continue with the trial.*

At the call of the case, Laifer responded that defendant was ready for the selection of a jury (Tr. 2), and, after some preliminary matters, a jury was then selected and sworn. Following the impanelling of the jury, the prosecutor suggested that opening statements be deferred until after the luncheon recess, by which time hopefully Mr. Jacobs would be available. Mr. Laifer, however, stated that he was prepared to open for the defendant. (Tr. 16). Accordingly, opening statements were then delivered by both sides. Immediately thereafter, Laifer, in the defendant's presence, stated that Sonnenschein

"has no objection to my having selected the jury, having opened in the case and then having Mr. Jacobs try the case." (Tr. 29).

After a luncheon recess Mr. Laifer, again in the presence of Sonnenschein, advised the trial judge that Jacobs still was not available. Laifer, however, agreed to have the examination commence of the Government's first witness, Triffleman, and further to cross-examine the witness if Jacobs had not yet arrived. (Tr. 32). The trial court agreed that if and when Jacobs arrived, Triffleman's testimony would be read back to him. (Tr. 33).

* On April 4th Judge Goettel expressed concern that jury deliberations in the state trial might prevent Jacobs from coming over for a few days. Defense counsel's last minute schedule jockeying created serious calendar problems for the busy district judge, who already had scheduled two successive trials to follow Sonnenschein's. Accordingly, given the simplicity of this case, the fact that Laifer previously had handled the first trial successfully and the absence of any objection from the defendant, the trial judge advised Laifer and the defendant that if Jacobs was not available trial would have to proceed with Laifer as counsel. (H 9).

Triffleman's testimony—both direct and cross—lasted the balance of the afternoon and Mr. Jacobs had not arrived by its completion. Before excusing the jury for that day, in the presence of Sonnenschein, the trial court advised the jury, as did Laifer in his opening, that "with the permission of the defendant" Jacobs would try the case starting the next day. (Tr. 169)

After the jury left the courtroom, Judge Goettel specifically asked the defendant whether he consented to the substitution of counsel and knew the reason for Laifer's proposed departure. Sonnenschein clearly acknowledged his awareness of the proceedings and his consent to the proposed substitution. (Tr. 170).*

* The following was the full colloquy between defendant, counsel, and the trial judge:

"(The jury left the courtroom.)

The Court: I want to get one thing on the record now, however.

First, that your departure tomorrow is with the permission of your client.

Mr. Laifer: Yes.

The Court: Is that so, Mr. Sonnenschein?

The Defendant: Yes, your Honor.

The Court: And, secondly, that someone from your firm will be here in the morning to continue this trial.

Mr. Laifer: Mr Jacobs will be here, your Honor.

The Court: You are sure of that?

Mr. Laifer: I hope so. He will be here.

The Court: I don't want a "hope." I want someone here.

Mr. Laifer: Yes, he will. There is no question about it.

The Court: If it's a question of jury sitting, get somebody else from your firm to sit with the jury while he comes here. I will send him back when the jury comes in.

Mr. Laifer: Thank you very much. It was a pleasure seeing you again, Judge.

The Court: Have a nice trip.

Mr. Duhamel: That was my application. I wanted to get the waiver on the record from the defendant.

[Footnote continued on following page]

On the morning of the next day, however, Sonnenschein and Jacobs, who now had arrived, for the *first time* expressed objection to the procedures that had been followed. Upon hearing of the defendant's sudden about-face and of the suggested flaws in the procedures that earlier had been urged by defense counsel with Sonnenschein's expressed approval, Judge Goettel immediately ordered that the airport be called and Laifer directed not to depart on his vacation. Mr. Jacobs, however, advised the trial judge that this effort would be futile since Laifer was either well on his way to, or already in, Bermuda. At this juncture, the trial judge, now sensing that counsel and the defendant had taken advantage of the situation, aptly noted: "Isn't that convenient." (Tr. 173).

In the ensuing colloquy, the defendant himself directly told the trial judge for the *first time* that although Jacobs in fact was the attorney with whom he had prepared for trial and whom he desired to have represent him, the proceedings on the previous day had gone further than he wanted with Laifer and that he (Sonnenschein) had not understood that Triffleman's testimony had been completed.* Mr. Jacobs then joined in and advised the trial court that he felt his hands were tied because his colleague, Laifer, already had opened and cross-examined the first witness. Jacobs claimed that he did not know

The Court: He has already said on the record that he agrees to let Mr. Laifer go.

Does the defendant know where you are going?

Mr. Laifer: Yes, he does.

The Court: All right. Have a nice trip.

Mr. Laifer: Thank you very much, Judge.

(Adjournment taken to Thursday, April 7, 1977 at 10:00 a.m.)." (Tr. 170).

* At no time prior to this statement had defendant stated that Jacobs, rather than Laifer, was the particular attorney in the law firm whom he wanted to represent him.

what specific questions had been asked or what promises, if any, had been made by Laifer in the defendant's opening.*

In response to these alleged concerns, the trial judge (i) granted an adjournment of several hours so that Jacobs could receive and review the transcript of the prior day's proceedings (which had been ordered on an expedited basis the day before), and (ii) told defendant that Triffleman would be recalled, if requested, as a Court witness for further cross-examination. (Tr. 182-84).

Thereafter, following Jacobs' opportunity to review the previous day's transcript, the trial continued. Defendant did not seek to have Triffleman recalled. Sonnenschein had the benefit of Jacobs' continued representation through the balance of the trial—which consisted of nine more witnesses called by the Government and defendant's own case. Moreover, Judge Goettel recessed the trial early on Friday afternoon, April 8, 1977, to allow defense counsel to prepare his summation over the weekend. (Tr. 406).

B. The Law Applied To These Facts

The well-settled law in this Circuit continues to be that the standard for determining the effectiveness of counsel is a stringent one:

"[U]nless the purported representation by counsel was such as to make the trial a farce and a mockery of justice, mere allegations of incom-

* It bears emphasis that it was only in this immediate sense that Jacobs stated he felt "unprepared." The misleading suggestion in defendant's brief (Br. 17) that Jacobs was not prepared in the sense of being unfamiliar with the case, is plainly wrong—given Jacobs' acknowledged earlier preparation—and is belied by the record of his subsequent performance. See *infra* at 20-24.

petency or inefficiency of counsel will not ordinarily suffice. . . . A lack of effective assistance of counsel must be of such a kind as to shock the conscience of the Court and make the proceedings a farce and mockery of justice. . . ."

United States v. Bubar, Dkt. No. 76-1140, slip op. 4519, 4536 (2d Cir., June 30, 1977), quoting *Rickenbacker v. Warden*, 550 F.2d 62, 65 (2d Cir. 1976), petition for cert. filed, 46 U.S.L.W. 3093 (U.S. Aug. 30, 1977) and *United States v. Wight*, 176 F.2d 376, 379 (2d Cir. 1949), cert. denied, 338 U.S. 950 (1950). See also, *United States v. Taylor*, Dkt. No. 320, slip op. 2805, 2829, 2842-43 (2d Cir., April 13, 1977); *Lunz v. Henderson*, 533 F.2d 1322, 1327 (2d Cir.), cert. denied, 429 U.S. 849 (1976); *United States ex rel. King v. Shubin*, 522 F.2d 527, 529 (2d Cir.), cert. denied, 423 U.S. 990 (1975); *United States v. Yanishefsky*, 500 F.2d 1327, 1333 (2d Cir. 1974); *United States ex rel. Testamark v. Vincent*, 496 F.2d 641, 643 (2d Cir. 1974), cert. denied, 421 U.S. 951 (1975). Furthermore, as this Court recently noted in *United States v. Bubar*, *supra*, slip op. at 4536-37, where a defendant intelligently has exercised his constitutional right to be represented by counsel of his choice, the question whether such representation conformed to the standard of effective assistance of counsel need not be reached.

In the circumstances of this case, Sonnenschein's selection of retained counsel to represent him—together with the attendant attempts of his counsel to obstruct the District Court's orderly proceedings—and his specific consent to the procedures that were adopted in the trial court, preclude assertion on appeal of the claim that this representation was ineffective. Moreover, even if this Court should reach the question of the effectiveness of his counsel, the record makes abundantly clear that Sonnenschein's representation at trial readily conformed to the standards enforced by this Circuit.

In the first instance, it is clear from the record of the events at trial that Sonnenschein expressly and implicitly consented to the bifurcated representation by counsel from the same law firm, throughout the time when effective action could have been taken by the trial judge to protect his interests if the defendant desired otherwise. Thus, it was only on the second day of trial, after Laifer already had departed and was unavailable, that Sonnenschein for the first time voiced any concern with the substitution of counsel. At that time, Sonnenschein's complaint was not that Jacobs was unprepared, but (i) that Laifer had proceeded further than Sonnenschein had expected and, more importantly from Sonnenschein's own statement, (ii) that Triffleman already had been dismissed as a witness and could not be cross-examined by Jacobs. To the extent that defendant's belated objection centered on the complaint that all along he expected Jacobs, rather than Laifer, to represent him, this simply was inconsistent with his specific consent to the procedures that had been adopted in his presence the day before.* If Sonnenschein

* Besides the fact that Sonnenschein consented to Laifer's representation on the first day of the trial, it is important to note that Laifer's representation was suitable and consistent with the quality assistance he had rendered at the prior trial. *See, infra* at 19-20. Nor did Sonnenschein claim on the second day of trial that he was dissatisfied with Laifer's efforts in his behalf. The gravamen of Sonnenschein's complaint was that Triffleman had been excused before Jacobs had an opportunity to cross-examine her with allegedly additional material in defendant's possession. Judge Goettel quickly offered to remedy this concern by recalling Triffleman as a Court witness for further cross. This offer, however, was not accepted even after Jacobs had the full opportunity to review Triffleman's testimony. Thus, it is **apparent** that Laifer adequately covered all bases of the desired cross-examination of Triffleman. The failure to accept the trial Judge's offer to recall Triffleman is further proof that defendant's sudden about-face from the day before was not motivated by a good faith concern that he had been prejudiced by the bifurcated representation.

truly expected or insisted upon the representation of only one of the two attorneys from the same firm retained by him, he had numerous opportunities to speak up earlier at times when the trial judge made clear he would not force the proceedings to go forward. Indeed, that Sonnenschein's sudden complaint about Laifer was little more than an after-thought of a defendant who saw an opportunity to seize upon an unusual development to his own advantage, was made apparent later by the fact that, at his sentence, Sonnenschein *again was represented* by Laifer. (S. 557-93). Moreover, on the same occasion Sonnenschein complimented the trial judge for the *two fair trials* he had received. (S. 587).

In short, notwithstanding his after-the-fact claimed displeasure with the course of his representation at trial, the record fully supports the conclusion that Sonnenschein knowingly and intelligently gave his express approval to that course—before any irrevocable acts had been taken—in order to secure the continued counsel of the lawyers he had selected.* To consider Sonnenschein's claim of in-

* On appeal, defendant suggests that his consent to the bifurcated representation was forced upon him by the "Hobson's choice" of having the case tried as it was, or by an attorney who faced either contempt fines or the loss of his vacation. (Br. 17). This argument, however, presupposes that the defendant was reluctant to speak up critically of this attorney. Yet, Sonnenschein did just this on the very next day in the presence of Laifer's associate, Jacobs. Moreover, the claim now advanced is at odds with Sonnenschein's desire to enjoy Laifer's continued representation after trial at sentence. Finally, there were numerous opportunities for Sonnenschein to voice objection to Laifer's continued representation on the first day of trial at times when the trial judge made clear that he would not force Laifer to proceed. See, e.g., (Tr. 29). In this regard, it is noteworthy that Sonnenschein was a well-educated defendant who had spent almost 13 years with the Department of Social Services in New York, having been a Supervisor for two years and later a "validator". (Tr.—I 159). He was a writer who had recently completed a book that was accepted for publication. (Tr.—I 587).

effective assistance of counsel in such circumstances, would countenance the right of a defendant misleadingly to cause the trial court to rely upon his consent to certain procedures, and then having done so, to withdraw his approval, to the detriment of all concerned. Cf. *United States v. Bubar, supra*.

Even if this Court reaches Sonnenschein's claim of ineffective assistance of counsel, it is clear that the representation here was effective and certainly not of a level to shock the conscience or to make the proceedings in the trial court a farce and mockery of justice.

In this Court, Sonnenschein's argument that he was denied effective assistance of counsel is premised upon the erroneous factual assertion that Jacobs, the second lawyer, was unprepared and ill-equipped to represent him at trial. In fact, however, as the record plainly demonstrates, see *supra* at 10, Jacobs had prepared to defend Sonnenschein prior to the original April 4, 1977 scheduled trial date and thus was as familiar with the case as Laifer, who handled the first trial.* Moreover, as the trial advanced with Jacobs representing Sonnenschein, defense counsel demonstrated an integral, comprehensive and effective familiarity with the case and the defense. The bald assertion that counsel was forced to resume this relatively simple case on April 7, 1977 without knowledge of prior trial developments, is contradicted by the fact that Jacobs was given ample time to review the one day's daily transcript before trial continued, as well as the opportunity to recall the Government's first witness if desired. Similarly, counsel was afforded the extra time provided by a weekend to review the full trial transcript and prepare his summation.

*It is noteworthy that Jacobs even had prepared the post-trial motions for dismissal after the first trial that ended in a hung jury. (H. 18).

The sorry picture defendant attempts to paint of an "inexperienced" and "unprepared" trial attorney in Jacobs, simply bears no resemblance to the record, which shows a seasoned defense attorney readily picking up the defense and continuing in a sure and effective presentation. Indeed a close inspection of the trial minutes establishes that, in the face of overwhelming evidence of guilt, the legal assistance rendered to Sonnenschein by both Laifer and Jacobs was at all times thorough and, to the extent possible, effective.

Thus, in his opening statement Laifer forcefully and clearly set forth the basic—and sole available—defense.* Contrary to the claim now advanced on appeal—that Laifer made pretentious and unrealistic promises in his opening—defense counsel's opening statement essentially mirrored that which he had undertaken with some success in the first trial, but improved upon with the benefit of Laifer's intimate knowledge of all of the evidence developed at the first trial.

Similarly, on cross-examination of Triffleman—whom he had cross-examined of course, at the first trial (Tr. I, 311-60)—Laifer covered all possible areas of impeach-

* The essence of Sonnenschein's defense was that Triffleman and DiGravio were lying about defendant's involvement in the December 3, 1976 sale, and that their falsehoods would be revealed by the inconsistent observations of the surveillance agents. A review of the record of the first and second trials makes clear that this defense was urged at both trials. The only substantive difference—beside the obvious advantage that at the second trial all of the Government's witnesses and their testimony were known—was that Sonnenschein did not testify at the second trial. This decision, however, had been reached *before* the second trial (H. 9), and obviously was a wise one since Sonnenschein's testimony was not credible. In fact, Judge Goettel later observed at sentencing that he believed the defendant had committed perjury at the first trial. (S. 584).

ment, having pointedly suggested during his opening that her cooperation with the Government gave her a motive to lie and that she had a strong interest to see Sonnenschein convicted. (*See, e.g., Tr. 24*).

Upon his arrival to continue the trial, Jacobs did not step into an uncharted or misdirected defense course, but was able to pick up the reins of a simple and planned defense, the point of which had been comfortably presented by his colleague and associate, Laifer.*

In his critical cross-examinations of agents White and Whelan, Jacobs established that neither had observed the transfer of money or drugs during their surveillance of DiGravio and the defendant.** Moreover, on cross-exam-

* Defendant suggests that Jacobs was hampered by certain "ill-guided" areas of the cross-examination of Triffleman conducted by Laifer, which allegedly opened the door to more extensive proof by the Government. In fact, only one area is pointed out—the prior relationship between Triffleman and Sonnenschein (Br. 18-20)—which in any way allegedly resulted in "opening the door." And the evidence which was admitted—that Sonnenschein previously had obtained methaqualone with Triffleman—was a similar act which, given the essential defense here, would have been admissible under any circumstances.

** Jacobs made the further points on White's cross-examination that: photographic equipment was available to the agents on the day of the sale but was not used (Tr. 224-226); DiGravio could have worn recording devices but did not (Tr. 226-227); and that at no time while in the coffee shop did White see a brown paper bag, a transfer of money, or a transfer of pills. (Tr. 232-33).

On cross-examination of Whelan, Jacobs brought out that Whelan did not overhear any of the conversations involving the defendant (Tr. 253), that he observed the suspects for approximately seven and one half to eight minutes (Tr. 254), that he never saw any pills or money at the booth where the defendant was seated (Tr. 254), and that he did not see DiGravio hold an amber bottle or any pills in his hand. (Tr. 255).

ination of DiGravio, Jacobs established that prior to the December 3rd transaction DiGravio never had heard of Sonnenschein, from the informant or otherwise (Tr. 367); that DiGravio did not conduct any surveillance of the defendant between the time of the sale on December 3, 1976, and his subsequent arrest weeks later (Tr. 396-97); and, that DiGravio's only contact with Sonnenschein during the entire investigation was limited to the December 3, 1976 meeting, when the defendant did not touch the bag or its contents while DiGravio was in the coffee house. (Tr. 379, 388). Finally, Jacobs carefully laid the ground work for the inconsistencies between DiGravio's observations of the events of December 3, 1976 and those of Triffleman, White and Whelan, matters which he argued extensively to the jury in his summation and which are the basis for other independent claims on this appeal. See *infra* at 24-27.

Indeed, in every single cross-examination, further examples of which we have set forth in the margin,* Jacobs

* Thus, for example, Morton Alperin, assistant manager of the Winfield Drug Store located at 1407 Broadway, New York City, identified certain exhibits, (GX 8a, 8b), as prescriptions for methaqualone made out to "Allan Sonnenschein" that were filled at his pharmacy. (Tr. 189-91). On cross-examination Jacobs established that it was conceivable for someone other than the person to whom the prescription was written to have it filled. (Tr. 199).

Sidney L. Rothstein testified that he was registered pharmacist and that he was a partner in the Duplex Pharmacy. (Tr. 202-03). He identified several prescriptions, one of which was for Triffleman for methaqualone. (GX 9a; Tr. 204-5). Jacobs elicited on cross-examination that the witness had never seen Sonnenschein before, and that it was possible for someone other than the person whose name appeared on the prescription to have it filled. (Tr. 209-10).

[Footnote continued on following page]

Albert Hochman identified the defendant as someone he knew from his pharmacy as "Marty Sachs." (Tr. 310). Hochman also identified GX 11-a as a prescription for methaqualone which was filled for the defendant. (Tr. 310-11). On cross-examination, Jacobs showed by use of the minutes of the first trial that Hochman could not remember at that time the name used by the defendant in his pharmacy. (Tr. 315-19).

Leon Liebshardt testified that he owned and operated Plaza Pharmacy in Manhattan, and identified the defendant as a man known to him as "Steinberg" or "Sheinberg" who had filled methaqualone prescriptions in his pharmacy. (Tr. 331-33). Liebshardt also identified certain methaqualone prescriptions as having been filled at his pharmacy. (GX 12a, 12b, 12c; Tr. 333-34). On cross examination Jacobs established that Liebshardt could not be sure who presented the above-noted prescriptions. (Tr. 338).

Luciano Caputo was called by the Government as an expert witness on handwriting. Caputo identified writing on certain important exhibits as being that of the defendant, Sonnenschein. (GX 1, 3; Tr. 265-67). On cross-examination, Caputo stated that, with regard to GX 1—a damaging paper identified by Triffleman as containing Sonnenschein's hand-written notations about how to obtain methaqualone directly from the manufacturer—he could not determine how many people wrote on the paper, or their sexes. (Tr. 270).

Vivian Krasner testified that on December 3, 1976 Triffleman told her prior to the sale that she and the defendant were going to the Burg-A-Cue to sell some methaqualone tablets. (Tr. 272-75). She also testified to certain admissions made by the defendant regarding his selling of methaqualone and asking her to fill methaqualone prescriptions for him. (Tr. 276-80). Jacobs then established that, when she met the defendant and Triffleman at the Burg-A-Cue immediately after the sale, the defendant never showed her any money (Tr. 293); and that, although she drove to the courthouse that morning with Triffleman, they never discussed the case. (Tr. 296).

demonstrated an expertise and familiarity with the case by making a variety of worthwhile and important points. The record shows that Jacobs' cross-examinations were extensive, thorough and plainly sufficient to support the basic defense urged consistently by Sonnenschein at both trials.*

The pointed and successful efforts of defense counsel were then neatly and persuasively melded together in Jacobs' summation to the jury. (Tr. 442-55). The experienced trial lawyer ** forcefully attempted to highlight such weaknesses in the Government's case as could be argued. He soundly attacked the credibility of Triffleman on the basis of matters disclosed through Laifer's earlier cross-examination. (Tr. 443-44; 449). He challenged DiGravio's account of the December 3rd events by referring to alleged inconsistencies developed in the cross-examinations of DiGravio and Triffleman. Jacobs hammered away at the claimed contradiction of DiGravio's and Triffleman's testimony by that of surveillance agents White and Whelan, who testified that they had not seen contraband or money change hands. Jacobs cleverly suggested that if the Government had failed to prove the substantive count, the jury readily could see the weaknesses in the conspiracy charge. (Tr. 452). In

* A comparison of Jacobs' cross-examinations at the retrial with those of Laifer's at defendant's first trial, is instructive. Both attorneys covered essentially the same areas with respect to each witness in the effort to advance the single defense raised at the two trials. Moreover, it is clear from his use of the transcript of the first trial that Jacobs had studied the evidence adduced at the first trial carefully, and thereafter made sound use of the transcript to impeach witnesses who in any way strayed from their previous examinations.

** Contrary to the present claim that he was "inexperienced," David Jacobs was a former Assistant District Attorney and had tried many criminal cases as a defense lawyer in both state and federal courts over a period of seven years. (H. 3; Tr. 180).

essence, Jacobs fairly appealed to the wisdom and common sense of the jury and plainly did a competent job with such tools as were available to him.*

Thus, upon this careful review of the record, it is clear that, far from a "farce and mockery", Sonnenschein's representation by both Jacobs and Laifer at the retrial, was exceedingly competent and amply warrants rejection of his claim of ineffective assistance of counsel. In the additional circumstances of defendant's original expressed approval of the procedures followed here by the lawyers he specifically had selected, Sonnenschein's constitutional argument simply is devoid of merit.

POINT II

The Trial Court Properly Submitted the Case to the Jury.

In remarkable contrast to his first argument that Sonnenschein's trial counsel was ineffective and unprepared, defendant's appellate counsel argues for his second point that the "dramatic inconsistencies" in the testimony, as developed successfully by the *same* trial counsel, required the trial judge to grant defendant's motion for a directed verdict of acquittal pursuant to Fed. R. Crim. P. 29. Quite apart from this gamesmanship by appellate counsel, on the facts of this case there can be no doubt that Judge Goettel's denial of the motion for a directed verdict was correct and proper.

* One badge of Jacobs' success was the fact that jury deliberations in this relatively strong case lasted several days and did not result in a verdict on Count 2, the substantive count.

The test to be applied by the trial judge in passing upon a Rule 29 motion is, of course,

"whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt."

United States v. Taylor, 464 F.2d 240, 243 (2d Cir. 1972), *quoting with approval, Curley v. United States*, 160 F.2d 229, 233 (D.C. Cir.), *cert. denied*, 331 U.S. 837 (1947). *See also, United States v. Hawley*, 554 F.2d 50 (2d Cir. 1977). Defendant's present claim, by exaggerating the significance and extent of the alleged "inconsistencies", seeks to apply this test in a manner which disregards the jury's right to credit the testimony of the Government's witnesses and to analyze the evidence in a common sense and practical way.

The first alleged "gross inconsistenc[y]" relied upon by Sonnenschein was Triffleman's testimony that the defendant immediately pocketed the money given to him by DiGravio on December 3, 1976, as contrasted with DiGravio's recollection that Sonnenschein "fanned" the money and held it in his hand for approximately 10 to 15 seconds. (Br. 25). Even taken at face value, this example hardly could be characterized as a "gross inconsistency", let alone one which required Judge Goettel to direct a verdict of acquittal. Moreover, the record does not show an inconsistency, since DiGravio clarified his testimony and explained that Sonnenschein held the money approximately "10, 12 seconds", during which time "he manipulated the bills so that you could see that there wasn't a wad of paper in between the bills." (Tr. 276-77).*

* In fact, DiGravio subsequently clarified his description of the time period by testifying: "... Five seconds? Six seconds? A very short time. . . ." (Tr. 389).

The second inconsistency urged by defendant is that between the testimony about the sale itself, from Di-Gravio and Triffleman, on the one hand, and the observations of White and Whelan on the other hand. After noting that the surveilling agents, White and Whelan, on December 3rd were approximately 10 or 15 feet away from the defendant, Sonnenschein argues that:

"Incredibly, White declared that he never saw anything that remotely indicated or resembled a drug transaction and that no money was passed, nor were any items exchanged.

Agent Whelan testified, corroborating Agent White." (Br. 26).

Again, this appellate editing misrepresents the thrust of the testimony of both agents, which upon analysis does not show the "dramatic" inconsistency claimed to have warranted a directed verdict.

While neither White nor Whelan actually saw the December 3rd transaction go down, both explained that their primary function on surveillance was to protect the undercover agent, a goal they could accomplish without constant undivided attention on the group under surveillance. The agents made clear that identification of suspects and observation of narcotics transactions were of secondary importance on surveillance. (Tr. 213-4). Indeed, Group Supervisor White testified that of approximately 1,000 surveillances in which he had participated, drugs were exchanged on approximately 60% or 70% of those occasions, however, he was able to observe transactions on only about a dozen times. (Tr. 231). Thus, taken together with the fact that both agents had to locate themselves practically with their backs to the transaction, it was neither incredible nor even curious that they were unable to observe the passing of contraband or money. (Tr. 218, 248). Moreover, White testified that

he was able to spend only a total of 20 to 30 seconds actually observing the subjects (Tr. 220), and Whelan was able to observe them for an approximate total of 7 minutes, only "snatching seconds at a time, because it would be too obvious." (Tr. 250).

In short, while these two alleged inconsistencies were worthy of argument to the jury, and indeed might even have clouded the factual determination for the jury in the defendant's favor, they clearly did not require the granting of defendant's Rule 29 motion. Judge Goettel's role, like that of an appellate court, was not to substitute his own view of the evidence for that of the jury's, *United States v. Sears*, 544 F.2d 585, 586 (2d Cir. 1976), but to determine, by crediting all the evidence and leaving questions of credibility for the jury, whether a reasonable juror fairly could conclude guilt beyond a reasonable doubt. *United States v. Taylor, supra*. Unquestionably, nothing in the alleged inconsistencies foreclosed a reasonable juror from crediting the testimony of Triffleman and DiGravio to readily find defendant guilty.

POINT III

The Government's Proof Supported the Charge of a Single Conspiracy.

Sonnenschein contends that although the indictment charged a conspiracy between him and Triffleman to distribute methaqualone, the evidence demonstrated two conspiracies because there were two different sources used by the defendants to obtain methaqualone—Dr. Miller and Rorer Laboratories. In view of defendant's motion for a mistrial on this ground (Tr. 104), Sonnenschein argues that his conviction on the conspiracy count must be reversed. As Judge Goettel in effect found, (Tr. 105-06), this claim is frivolous in the extreme.

The evidence, of course, plainly was sufficient to permit the jury to find the single conspiracy charged in the indictment. The indictment alleged an agreement between Sonnenschein and Triffleman to possess with the intent to distribute, and to distribute, quantities of methaqualone. The specific sources of this methaqualone were not charged in the indictment, although defendant was given more than adequate notice of both sources. (Tr. 105-06). The evidence at trial simply and convincingly demonstrated that Sonnenschein and Triffleman agreed to, and acted together in, this single criminal enterprise, which specifically embraced obtaining quantities of methaqualone for sale on the street from *both* Dr. Miller and Rorer Laboratories. Since it was part of defendants' agreement to obtain methaqualone from any sources, the fact that they attempted to make use of more than one source simply does not affect the showing of a single conspiracy.*

* Moreover, even if there was any force to defendant's claim, Sonnenschein has made no showing of how the purported variance, if any, prejudiced him. *United States v. Head*, 546 F.2d 6, 8 (2d Cir. 1976), *cert. denied sub nom. Wheaton v. United States*, — U.S. —, 97 S.Ct. 1551 (March 21, 1977); *United States v. Ricco*, 549 F.2d 264, 270 (2d Cir. 1977); *United States v. Toliver*, 541 F.2d 958, 963 (2d Cir. 1976); *United States v. Chong*, 544 F.2d 58, 66 (2d Cir. 1976); *United States v. Miley*, 513 F.2d 1191 (2d Cir. 1975), *cert. denied*, 423 U.S. 842 (1976). Indeed, even if the two methaqualone sources constituted separate conspiracies, each would have been admissible against Sonnenschein as a similar act at the trial of the other. *United States v. Sir Kue Chin*, 534 F.2d 1032 (2d Cir. 1976). Finally, since the difficulty of joining several conspiracies together is the danger of spillover affecting different defendants at a single trial, the single/multiple conspiracy analysis does not apply at all to the trial of a single defendant, as in Sonnenschein's case. *United States v. Sir Kue Chin*, *supra*, 534 F.2d at 1025.

POINT IV

The Superseding Indictment Did Not Expose Defendant To Double Jeopardy.

Between the first trial and the retrial a superseding indictment was filed which incorporated certain ministerial—and in one case, substantive—changes, all of which were developed in the course of the first trial. Defendant now argues that these changes in the superseding indictment violated his constitutional rights on double jeopardy and due process grounds.

During the first trial several clerical errors in the indictment were brought to the attention of the District Court and the Government. Specifically, the drug methaqualone had been characterized as a “narcotic”; the weight of the drug listed in Count Two was set forth by its gross weight of 205.38 grams, instead of the net weight of 90.87 grams; and several typographical errors had been corrected and initialed by the foreman at the time that the first indictment was returned. These ministerial changes were incorporated in the superseding indictment prior to the second trial. Finally, the one and only substantive change in the indictment was that the temporal scope of the conspiracy was extended by approximately two and one half months—to February, 1977—in accordance with testimony which developed for the first time during the original trial.

It cannot seriously be argued that any of these ministerial changes included in the superseding indictment and made known to the defendant at the first trial, prejudiced him in any way. Indeed, all of these changes were of such a nature that they could have been made by the trial court or the prosecutor without returning to the grand jury to obtain a superseding indictment. *United*

States v. McGrath, Dkt. No. 77-1064, slip op. 4827, 4831 (2d Cir., July 19, 1977).*

With respect to the expansion of the time of the conspiracy, however, defendant argues, without any supporting legal authority, that this "change" exposed Sonnenschein to double jeopardy because it was a substantive variation from the original indictment. The simple answer to this contention, of course, is that at the retrial the Government would have been entitled to prove the longer duration of the conspiracy even if the indictment had not been superseded, since Sonnenschein was on notice of this proof and the time variation was not of such a nature as to give rise to a claim of prejudicial variance. *United States v. Panebianco*, 543 F.2d 447, 455 (2d Cir. 1976). Furthermore, since Sonnenschein neither had been convicted nor acquitted, there simply was no double jeopardy restraint on a superseding indictment. *United States v. Sanford*, 429 U.S. 14 (1976); *United States v. Alberti*, Dkt. No. 76-1543, slip op. 5505 (2d Cir., Aug. 24, 1977). Finally, Sonnenschein's novel claim of double jeopardy is undermined by the law in this circuit which permits an already charged and tried transaction to be included in a new, wider-ranging conspiracy indictment, *See, e.g., United States v. Cheung Kin Ping*, 555 F.2d 1069, 1072 (2d Cir. 1977); *United States v. Arredo-Sarmiento*, 545 F.2d 785, 792 (2d Cir. 1976), and cases therein cited.** Thus, the claim that the

* Moreover, as Judge Goettel noted, since none of these changes were objected to prior to the first trial, defendant's claims of defects in the indictment were waived. Fed. R. Crim. P. 12(b). *See* H. 18.

** In *Cheung Kin Ping*, for example, defendant was tried and convicted in the Southern District of New York on a smuggling conspiracy charge which included crimes for which the defendant had been tried in another district. The included offenses had formed the basis for Cheung's earlier conviction, in the other

[Footnote continued on following page]

superseding indictment here placed Sonnenschein in double jeopardy, simply has no basis in law or fact.*

POINT V

The District Court Did Not Commit Error in Permitting Jury Deliberations to Continue to a Verdict.

Sonnenschein argues that the jury's deliberations were inordinately long and that the trial judge committed error in denying defendant's motions for a mistrial. In the circumstances of this case, where the jury never claimed that it was unable to reach a verdict and in fact expressed its collective view that further deliberations could be productive, Judge Goettel did not abuse his discretion in permitting deliberations to continue to a verdict.

It is an established principle that "[t]he period for which the jurors should be kept together is in the discretion of the trial judge." *United States v. Minieri*, 303 F.2d 550 (2d Cir.), *cert. denied*, 371 U.S. 847 (1962); *United States v. Novick*, 124 F.2d 107 (2d Cir. 1941), *cert. denied*, 315 U.S. 813 (1942). *See also*, *United States v. Pope*, 415 F.2d 685, 690 (8th Cir. 1969), and cases

district, which had been reversed on appeal on double jeopardy grounds. This Court rejected Cheung's claim on appeal that inclusion of the already-reversed charges in the Southern District of New York indictment violated his double jeopardy rights. The propriety of Sonnenschein's conviction on the superseding indictment here, thus follows *a fortiori* from *Cheung Kin Ping*.

* The urging of a double jeopardy claim on these facts manifests a misunderstanding of the double jeopardy protection. The result of the trial court's order granting defendant's motion for a mistrial at the first trial meant no more than that: "The prisoner has not been convicted or acquitted, and may again be put upon his defence." *United States v. Perez*, 9 Wheat, 579,

[Footnote continued on following page]

therein cited. Judge Goettel properly exercised his broad discretion in this case.

While the jury's deliberations occurred over several days, the actual time of deliberations before a verdict was announced on count one was approximately 18 hours.* At no time during its deliberations did the jury report that it was deadlocked, or ask for the trial court's assistance on how to reach a verdict. Indeed, on the one occasion when the trial judge asked the jury if it thought a verdict could be reached, the foreman responded that the jury was "close" to a verdict on at least one count. (Tr. 532). At no time did the trial judge find it necessary to administer even a modified *Allen* charge, nor were any steps taken that arguably could have been considered coercive or cajoling of a verdict. Instead, the pattern of deliberations here showed a conscientious jury carefully, if slowly, analyzing the exhibits and testimony in a deliberate and good faith effort to reach a verdict. Accordingly, Judge Goettel's refusal to grant Sonnen-schein's motions for a mistrial—the first of which was made as early as after the completion of only less than ten hours of deliberations (Tr. 522)—plainly was correct and not an abuse of his discretion.

580 (1824). Since the Government had the right to retry defendant, there was no restriction on the charge or charges upon which the defendant might be retried. See generally *United States v. Sanford*, 429 U.S. 14 (1976) (per curiam); *United States v. Alberti*, Dkt. No. 76-1543, slip op. 5505, 5511-14 (2d Cir., August 24, 1977).

* Although the jury reported its verdict on the morning of April 14, 1977, this came about only in response to the trial judge's inquiry whether any verdict had been reached. Thus, it seems clear that the jury had arrived at this verdict sometime earlier that day, but chose not to report it on their own while attempts to reach a unanimous decision on Count Two. (Tr. 548-50).

POINT VI

As Admitted By Defense Counsel at Trial, There was no Attorney-Client Issue With Respect to GX 1.

As his final claim, defendant argues that his attorney-client privilege was violated by the introduction of GX 1, a piece of paper in Triffleman's possession which contained notations of Dr. Miller's licensing number, the telephone number of the DEA compliance investigator and other information regarding the procedures to order drugs directly from a pharmaceutical company. (Tr. 42-43). Defendant's appellate counsel contends that this paper apparently was obtained from Sonnenschein's lawyer without a waiver and that the defense moved for a mistrial when the trial court received this exhibit. This contention represents a flagrant distortion of the trial record. In fact, it was shown at trial that the exhibit exclusively came from Triffleman, and defense counsel in effect withdrew his objection to the exhibit after these facts were clarified. The mistrial motion to which appellate counsel refers (Br. 32), simply had no bearing on this exhibit, but was directed to a different claim relating to the indictment.

Prior to the trial, the Government advised Laifer that it had in its possession certain documents which arguably fell within the defendant's attorney-client relationship with a previous lawyer. (Tr. 6). The matter was discussed before trial and, based upon the Government's representation that it would not use those exhibits at trial, the trial court deferred decision on their admissibility. (Tr. 6-10). At the same time the Government advised the court and Mr. Laifer that it intended to introduce certain documents to which *no attorney-client* privilege attached. (Tr. 10-11).

Later, defendant's counsel objected to the introduction of GX 1 during the course of the direct testimony of

Triffleman. (Tr. 44-46). At a side-bar conference Laifer argued that GX 1 was the specific document in issue on the attorney-client argument that had been discussed earlier. (Tr. 44). The court reserved its decision as to the admissibility of that document, pending further questioning of Triffleman. Thereafter, out of the presence of the jury, Judge Goettel inquired of Triffleman how she obtained GX 1. In response to the trial judge's question, Triffleman stated: "That was a piece of paper that belonged to me, that I had, that never left my possession." (Tr. 103). The following colloquy then occurred:

"The Court: Do you want to ask some questions, then, Mr. Laifer? I don't see the basis of your motion here.

Mr. Laifer: Your Honor, I must apologize to the court. I was mistaken." (Tr. 103).

Thus, as is painfully obvious, the facts as represented by the defendant in his brief are totally incorrect: no objection remained as to the receipt of GX 1, and no mistrial motion was made on the basis of the introduction of that exhibit.*

* In fact, the motion for a mistrial on page 104 of the record, to which defendant refers in his brief, related to an entirely different issue: the claim that multiple conspiracies were proved by the two sources of methaqualone. See, Point III, *supra*. (Tr. 104).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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